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In The Supreme Court of the State of Utah

IN RE CONTEMPT
of
NEUMAN C. PETTY,

Appellant

Brief of Respondent

Appeal from the finding of contempt and
sentence therefrom of the Third District Court
in and for Salt Lake County, Hon. Mr. Justice
Judge

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In The Supreme Court of the State of Utah

IN RE CONTEMPT

of

NEUMAN C. PETTY,

Appellant.

} Case No.
10690

Brief of Respondent

STATEMENT OF NATURE OF CASE

The appellant, Neuman C. Petty, appeals from a judgment of the Honorable Merrill C. Faux, Judge of the Third Judicial District Court, finding the said Neuman C. Petty in contempt of court for refusal to testify in the trial of Billie Maurine Newsom, then pending in the District Court of Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, Neuman C. Petty, was called as a witness on behalf of the State of Utah to testify in the case of **State of Utah v. Billie Maurine Newsom**, Criminal No. 19534, Salt Lake County, State of Utah. Mr. Petty, after giving his name and address, re-

fused to answer any further questions posed by counsel on the grounds that the answers would tend to incriminate him. The Honorable Merrill C. Faux, judge, determined that the appellant's invocation of the privilege was not proper and adjudged the appellant in contempt of court. The appellant was sentenced to be imprisoned in the county jail for a period of 30 days.

RELIEF SOUGHT ON APPEAL

The respondent submits that the adjudication of the appellant's contempt should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts, in addition to those set forth in the appellant's brief and in supplement there to:

The appellant was called as a witness on behalf of the State in the case of **State of Utah v. Billie Maurine Newsom**, Criminal No. 19534 (Tr. 51). Prior to the time the appellant was asked to testify, counsel for Mrs. Newsom, who had apparently been counsel for Mr. Petty, at one time, advised the court that Mr. Petty intended to invoke his privilege against self-incrimination (Tr. 51). Counsel indicated that the indictment against Mrs. Newsom arose out of the proceeding of the Salt Lake County Grand Jury during 1965. He further advised the court that Mr. Petty was under indictment for the crime of conspiracy to commit certain crimes in violation of

Title 76, Chapter 12, Section 1.1, Utah Code Annotated, 1953. A copy of that indictment appears in the record, page 9, of this appeal. Subsequent to argument, the district attorney, Mr. Jay E. Banks, was sworn and testified to a conversation he had with Mr. Petty (Tr. 58). He stated:

"My name is Jay E. Banks; I am the District Attorney in the Third Judicial District. I have knowledge as of this time—independent knowledge—that the defendant in this case, Maurine—or Billy Maurine Newsom—went to Mr. Petty—Newman C. Petty—prior to June 30th of 1965 and told him that she had taken some \$400 and—approximately \$460.00—and that she offered to repay it; and that a payroll deduction was taken out of two of her checks of \$23.25 each; and, then, that she paid Motor Lease, who was employed—who had employed her—and a balance in a check from her checking account in the sum of, oh, \$419-and-something, approximately."

Mr. Banks testified his knowledge came from a conversation with Mr. Petty before trial.

Subsequent to the district attorney's testimony, he made a motion to dismiss so much of the conspiracy charge in Criminal Case No. 19538 as was then pending against the witness, Neuman C. Petty. Thereafter, three questions were asked of the witness, which he refused to answer. The first question was as follows:

"Q During the year of 1964 and 1965, were you affiliated with Motor Lease?"

The court stated that it had reviewed the matter and, in the opinion of the court, the question did call for "an answer and will not be incriminating nor degrading" (Tr. 73). In the face of the court's advice,

counsel for the appellant continued to advise his client not to answer the questions.⁽¹⁾ The appellant then refused to answer the question. The district attorney then asked if Mr. Petty would answer any question other than his name and address. Counsel for the appellant indicated that he would advise his client not to answer any questions (Tr. 74). The district attorney then put the second question to the appellant, which was as follows:

“Q All right; then, I will ask you if—if you know Maurine—or Billy Maurine Newsom?”

Appellant refused to answer the question on the grounds that the answer would tend to incriminate him. The court advised the appellant that it could see nothing in the answer which would tend to incriminate him and directed that the question be answered. Appellant refused (Tr. 75). Subsequently, the district attorney asked the third question, which was as follows:

“Q I will ask you if you were ever present when a conversation was had with Mrs. Newsom, the defendant in this case, relative to any missing funds in Motor Lease?”

Again, the appellant refused to answer the question. The court determined that the question was proper and admonished appellant to answer and he refused. The district attorney then forewent any further questioning, and the court adjudged the appellant in contempt of court.

(1) At this time, Mr. Robert McRae appeared and represented the appellant.

Based upon the above facts and those allied facts set forth in the brief of appellant, non-argumentative in nature, respondent submits that the adjudication of contempt should be affirmed.

ARGUMENT

POINT I.

THE TRIAL COURT CORRECTLY DETERMINED THAT THE APPELLANT'S INVOCATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION WAS IMPROPER, SINCE FROM THE RECORD, IT APPEARS THAT THE ANSWERS TO THE QUESTIONS POSED WOULD NOT TEND TO INCRIMINATE THE APPELLANT UNDER THE CIRCUMSTANCES.

Respondent concedes, for the purposes of this appeal only, that it is improper for a court to order a witness to answer a question, the answer to which might tend to incriminate the witness, even though, if the witness did, in fact, answer over his invocation of the privilege, after being so directed by the court, the evidence could not be used against him. **State v. Byington**, 114 Utah 388, 200 P.2d 723. The respondent does not, however, concede the correctness of the ruling in the Byington case, as such, but concedes that if Mr. Petty's invocation of the privilege against self-incrimination was proper, he could not be found in contempt merely because, had he testified after admonition by the court, the evidence could not have been used against him. **Raley v. Ohio**, 360 US 423 (1957). The respondent concedes that the privilege against self-incrimination pro-

tected the witness from being coerced to answer questions which may tend to incriminate him in the absence of a grant of immunity, even though, were he compelled to give the evidence, it could not be used against him. Section 77-31-9, Utah Code Annotated, 1953.

It is, however, the position of the respondent that the questions posed by the district attorney, which the appellant refused to answer were (1) so innocuous and unlikely to incriminate as to warrant the court in determining that the invocation of the privilege was unjustified and (2) that in view of the district attorney's dismissal of the conspiracy charge against the appellant, there was no likelihood of incrimination and that the court's finding of contempt was justified.

The respondent acknowledges that the provisions of the Fifth Amendment to the Constitution of the United States, as well as the provisions of Article I, Section 12, of the Constitution of the State of Utah, protect an individual who is a witness from giving testimony which will tend to incriminate him. *Malloy v. Hogan*, 378 U.S. 1, (1963).

It is submitted that the trial court, however, could correctly determine from the position of the case before him that there was no likelihood that the answers to the questions posed by the district attorney, if given by Mr. Petty, would tend to incriminate him.

Section 77-31-7, Utah Code Annotated, 1953, allows the prosecution at any time before the defendants have gone into their defense to apply to the court for dismissal of the charge in exchange for the testimony of the defendant as a witness for the State. In the instant case, the district attorney dismissed the charges against the witness, Neuman C. Petty, on the indictment for conspiracy pending in the district court. Consequently, this dismissal, in exchange for his testimony under the above statute, and 77-31-9, Utah Code Annotated, 1953, would preclude subsequent prosecution of the case, and therefore give to the witness protection against prosecution relating to that charge. It could not therefore be contended that any testimony that Petty gave would be likely to incriminate him under the pending indictment. Even so, it is submitted that the questions posed by the district attorney were so preliminary and so innocuous that there was no real likelihood that the answers the witness might give would be likely to incriminate.

It is well settled that a claim of privilege must be more than a fanciful or imaginary danger; it must be real and relate to a "probability" of prosecution. 4 Jones, Evidence, Sec. 861 (1958). McCormick, Evidence, p. 271 (1954), comments on the required showing:

"A classic statement of the test is that 'the Court must see, from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to

answer. It seems that to meet this test the court must find (1) that there is substantial probability that the witness has committed a crime under the law of the forum and (2) that the fact called for is an essential part of the crime, or is a fact which taken with other facts already proved, or which may probably be proved, would make out a circumstantial case of guilt."

See also Wigmore, Evidence, 3rd Ed., Sec. 2261.

In **Mason v. United States**, 244 U.S. 362 (1917), the United States Supreme Court noted the general standard was expressed:

"The constitutional protection against self-incrimination 'is confined to real danger and does not extend to remote possibilities out of the ordinary course of law.'"

Further, the court noted:

"The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

"In the present case the witnesses certainly were not relieved from answering merely because they declared that so to do might incriminate them. The wisdom of the rule in this regard is well illustrated by the enforced answer, 'I don't know,' given by Mason to the second question, after he had refused to replay under a claim of constitutional privilege."

The first question of whether the witness, Neuman Petty, was associated with Motor Lease could hardly tend to incriminate him where there was no conspiracy charge pending against him, and his mere association with the company would in no way draw him to liability for some remote wrongdoing. Certainly, also, the question of whether or not he knew the defendant in the instant case was a neutral question, the answer to which would not place the appellant in any position where it would tend to incriminate him. Whether he knew Billie Maurine Newsom or not would hardly be an incriminating factor, and there was no indication that merely knowing her would lead to his prosecution or the likelihood of his being charged or convicted of any offense, nor even, for that matter, be relevant or responsive to the conspiracy indictment which was barred by the district attorney's dismissal under the provisions of Section 77-31-9, Utah Code Annotated, 1953. Certainly, those two questions were so innocuous that they posed no real possibility that the witness would be placed in jeopardy had he responded in each instance with a simple "yes" answer, which was the obvious conclusion called for.

The question as to whether he had ever had a conversation with Mrs. Newsom relative to any missing funds in Motor Lease is equally innocuous, and the premise the appellant now seeks to sustain the basis for his refusal to answer has no legal merit. The district attorney's testimony was to the

effect that he had a conversation with Mr. Petty in which Mr. Petty acknowledged that Billie Maurine Newsom had embezzled some money from Motor Lease, Inc., and that it had been paid back. Appellant attempts to raise this action into the area of making Mr. Petty an accessory to a crime. If Mr. Petty was an officer of Motor Lease, which he was, he would certainly have a right to make arrangements to recoup funds converted by an employee. Further, an agreement to accept repayment of funds and not to pursue any further prosecution would not render the appellant an accessory. Section 76-1-45, Utah Code Annotated, 1953, defines "accessories as follows:

"All persons who, after full knowledge that a felony has been committed, conceal it from a magistrate, or harbor and protect the person who committed it, are accessories."

There is no affirmative obligation imposed by the statute on the part of an individual who has mere knowledge of a crime to disclose it. He must actively conceal it from a magistrate or harbor or protect the person who committed it. Consequently, the actions indicated by counsel for the appellant, Mr. Hatch, at the time he was arguing in favor of the invocation of the privilege on the possibility that Mr. Petty would be subjected to a prosecution as an accessory do not hold up under the statute.

Finally, the appellant cites Section 76-28-58, Utah Code Annotated, 1953, relating to compounding or concealing crime as being applicable, and

that had Mr. Petty accepted repayment and indicated that he would not prosecute, he could possibly be guilty under the provisions of that section. It is submitted that there is no merit to that contention, since Section 76-28-58, Utah Code Annotated, 1953, applies where an individual has knowledge of the crime, takes money or property of another or gratuity or award or any engagement of promise thereof to compound and conceal the crime. The facts as testified to by the district attorney and even when construed in a light most favorable to the appellant, as indicated by Mr. Hatch, does not justify a finding that that provision was violated. Indeed, there was merely an understanding, at best, that the witness would accept repayment of funds to which the witness or his company was entitled. This is not a violation of Section 76-28-58, Utah Code Annotated, 1953. As a matter of broader principle, the State would be most happy to accept the position urged by the appellant that his conduct could subject him to prosecution as an accessory or for concealing or compounding a crime, for to do so would construe the Utah statutes in accordance with the common law offense of misprision of a felony. Russell on Crime, 12th Ed., Vol. 1, pp 167-168 (1963); Goldberg, **Misprision of Felony: An Old Concept in a New Context**, 52 ABAJ 148 (1966); **Regina v. Crimmins**, [1959] V.R. 270.

It is submitted, however, that it was obviously not the intent of the Legislature to have the above mentioned sections so broadly construed as appel-

lant would now argue. Therefore, there was no possibility of his prosecution under either of the statutes. Consequently, at the time the appellant refused to answer the third question posed by the district attorney, there was no likelihood of him incriminating himself.

From what has been said, and at least, certainly, as to the first two questions asked, there was no likelihood of the appellant in any way incriminating himself or any tendency that the testimony he would give would incriminate him. Obviously, the appellant was participating in a defense scheme to frustrate the prosecution of the case pending against Billie Maurine Newsom.

In **The Queen v. Boyes**, 1 B. & S. 311, 121 Eng. Rep. 730 (1861), it was said as to the privilege:

“Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extra-ordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility

of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

The circumstances of the instant case are almost squarely within the law of the Mason case and Boyes case referred to above. Under these circumstances, it can hardly be said that the trial judge, who saw the witnesses and their expressions, abused his discretion in finding that there was no real danger to appellant from answering the prosecution's questions.

Courts have always recognized a requirement that there be a substantial likelihood of injury or actual prosecution. McNaughton, **The Privilege Against Self-Incrimination, Its Constitutional Affection, Raisor D'Etre and Miscellaneous Implications**, 51 Jnl. of Crim. Law, Criminology and Police Science, p. 138 (1960).

Even applying the broad standards of **Malloy v. Hogan**, supra, as set down by the United States Supreme Court, it is apparent that there was no substantial likelihood or even a possibility that the appellant's testimony in response to the questions posed by the district attorney would have incriminated him. See also **Hoffman v. United States**, 341 U.S. 479 (1951) at p. 486.

It is submitted that certainly the question of whether or not the appellant knew Billie Maurine Newsom could not have had a tendency to incriminate him, and that in any event, even if the other questions, by the wildest stretch of imagination,

could be said to have had a possibility to incriminate, the one question standing and the appellant's refusal to respond would justify the trial court's conviction.

POINT II.

THE APPELLANT WAIVED HIS RIGHT TO INVOKE HIS PRIVILEGE AGAINST SELF-INCRIMINATION BY PREVIOUS STATEMENTS MADE TO THE DISTRICT ATTORNEY OF THE THIRD JUDICIAL DISTRICT.

The testimony of District Attorney Jay E. Banks was to the effect that the appellant had previously disclosed certain information to him, which information was covered by the questions asked the appellant. It is submitted that, as a consequence, the appellant has waived any right to claim the privilege against self-incrimination. The State does not contend that the position argued in this point is supported by the majority of courts. **In Re Neff**, 206 F.2d 149 (3rd Cir. 1953); 36 A.L.R.2d 1398; Wigmore Evidence, Sec. 2275. However, no decision of the United States Supreme Court has been found **directly** passing on this issue, and it is submitted that the better rule is that espoused by Professor McCormick in his treatise on evidence, where he observes that there "could be a strong contrary argument" on whether prior disclosure of the incriminating fact would be a claim of privilege at a later time on the same subject matter.

Consequently, it is submitted that until the United States Supreme Court has clearly said that previous disclosure of evidence that may be subsequently claimed to be incriminatory does not constitute a waiver, that this court should adopt the position advocated by Professor McCormick, which is certainly the most reasonable position. Once the cat is out of the bag, there seems to be little reason why the privilege against self-incrimination should still be available to a witness, especially where the nature of the prior disclosure was such that the evidence could be used against the individual, if the prosecution was so inclined to do so.

It is, therefore, respectfully submitted that the appellant had waived his right against self-incrimination.

CONCLUSION

An examination of the record in this case clearly demonstrates that there was no reasonable invocation of the privilege against self-incrimination by the appellant. There simply was no danger that the answers to the three questions posed by the district attorney, or any one of them, would tend to incriminate the appellant. Further, the respondent submits that even if it can be said that any one of the questions might have had a tendency to incriminate, that the other questions were such that there was no possibility of their evoking an incriminatory

response. Consequently, the trial court's determination to hold the appellant in contempt was justified. This court should affirm.

Respectfully submitted,

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